IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 586 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ARVINDBHAI SOMABHAI PRAJAPATI - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KARTIK V PANDYA for Appellant(s) : 1,
Mr.R.C.Kodekar, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 11/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal is filed under Section 374 of the Criminal Procedure Code by the present appellant - original accused who has been convicted by the learned Additional Sessions Judge, Fast Track Court No.2, Mehsana on 13.8.2003 in Sessions Case No.37 of 2003 under Section 376 of Indian Penal Code for life imprisonment and also awarded a fine of Rs.10,000/- and, in default, to undergo 3 years RI.

2. The facts which have been established from the prosecution case are as under :

2.1. On 12.11.2002 at 5.00 p.m., the incident has taken place in broad day light in the house of the appellant – accused and the victim was staying just opposite each other in the society. The victim aged **4 ½ years** was playing in front of her house from where the appellant – accused aged **52 years** has called her. The appellant - accused took her in his house and tried to play with her various parts of the body and ultimately rape has been committed by him. While doing so, the victim shouted for help; her mother heard the same and therefore, she came out from her house and crossing the road, she reached in the house. At that time also, the accused continued rape on the victim and seeing the mother of the victim, the accused left the house after wearing the clothes in presence of mother of the victim. The mother of the victim found that bleeding was passing through from the victim's vital vaginal part and thereafter she came out with victim from the house of the

appellant – accused. She met Jayantibhai Nayak and narrated the same to him. Thereafter, she took victim in Vijapur hospital where she has narrated the incident to the Doctor. In turn, the doctor has informed the police. The police has noted down in the station dairy as Vardhi and, thereafter, P.S.I., Mr.Gohil has visited the hospital where he has recorded the complaint given by the mother of the victim, which was registered for the offence punishable under Section 376 of Indian Penal Code. Thereafter, the appellant – accused was arrested and sent to the hospital for medical examination. Simultaneously, they also prepared the panchanama of scene of offence and also seized the muddammal from the scene of offence and from the body of the accused and victim; recorded the statements of various witnesses; on receiving the medical certificate, the same has been kept in investigation file. The muddammal which has been seized during the course of evidence has been sent to FSL and on arrival of the FSL report, it has been kept in file by the police.

At the end of investigation, charge sheet has been submitted in the Court below and as the offence in question is exclusively triable by the Sessions Court, the learned JMFC committed the same to the Court of Sessions.

2.2. On receiving the same, it has been numbered as Sessions Case No.37 of 2003 and it has been sent to the Court of learned Additional Sessions Judge,

Fast Track Court No.2. When the accused appeared before the Court, charge exh.3 has been framed and as the accused pleaded not guilty and prayed for trial, the prosecution examined in all 11 witnesses and also produced and placed reliance upon various documentary evidence and at the end of trial, further statement of accused under Section 313 of Criminal Procedure Code was recorded and thereafter, after giving opportunity to the learned advocates for the respective parties, learned Sessions Judge delivered the judgment and convicted the accused as stated in para 1 above which gave rise to the present appeal.

3. Being aggrieved and dissatisfied by the above judgment, the appellant has approached the High Court Legal Service Committee and, in turn, the matter is handed over by the Authority to the learned advocate Mr.K.V.Pandya. When it was came up for hearing, we have decided to hear the appellant on both.

4. Heard the learned counsel for the appellant Mr.K.V.Pandya and on behalf of the State, learned APP Mr.R.C.Kodekar.

5. Mr.Pandya, learned counsel for the appellant, who is having record with him and also going through the original record and proceedings which have been provided by us, has mainly argued that except the mother of victim, there is no other eye witness of the incident and she being an interested witness, the trial Court ought not to have

relied upon her. It has also been argued by him that oral evidence of the victim who is aged about 4 and ½ years is not trustworthy. It has also been argued by Mr.Pandya that the witness – Jayantibhai Labhshankar Nayak – PW 8, Exh.25 is not the witness of incident, but he has been informed by the mother of the victim and, therefore, his evidence is not of much value in the eye of law. He has also argued that extra-judicial confession recorded by Dr.Jitendrabhai Sutariya who has examined the appellant accused is not trustworthy. He has also argued that he has been taken to the hospital by the police and at that time, he was arrested and, therefore, the Court below ought to have taken into consideration the above aspect of the matter.

6. Learned APP Mr.Kodekar has argued that there are ample evidences on record to connect the accused with the crime in question. He has argued that the age of victim is 4 and ½ years. The incident has taken place in broad day light. The appellant accused and victim are neighbours and they were staying to the house situated opposite each other. After taking us to the oral evidence of the complainant - mother of the victim, PW 3 – Exh.15, Mr.Kodekar has argued that she is not only the mother of the victim and complainant, but she is witness of the incident for which he took us to the whole evidence and he has shown us from the same and argued that she has categorically deposed the incident and according to her, when she reached to the scene of offence after hearing shouting of help from her daughter, at that time, the appellant accused was

continuing rape on her.

6.1 So, in short, according to the learned APP, the mother of the victim reached to the scene of offence at the time when the commission of offence was continuing by the accused. It has been argued by Mr.Kodekar that though the victim is minor, aged about 4 and ½ years, then also, she has also stated something. Not only that, he also took us to the evidence of Dr.Bhikhabhai Maganbhai Patel – PW 1, Exh.7, who has examined the victim and argued that the prosecution case got support from the evidence of Doctor. Along with that, he also took us to the certificate issued and proved by the said Doctor. Along with that, he also took us to the FSL report and after showing the same, it has been argued by him that blood group of the victim was “O” and blood group of the appellant accused is “B”. Showing the same, it has been further argued by Mr.Kodekar that the muddamal bed-sheet and other clothes which have been seized from the scene of offence and from the body of the victim are having the same.

6.2 Simultaneously, Mr.Kodekar also took us to the FSL report qua clothes which alleged to have been worn by the appellant accused at the time of incident and the same have been seized by way of Panchnama wherein clear mark of particular group has been established. Lastly, it has been argued that even the statement of Jayantibhai Nayak has also got some value, because at the earliest she has informed Mr.Nayak who was just passing and in turn, the same

has been recorded. As far as sentence is concerned, it has been argued by Mr.Kodekar that looking to the nature of offence and injury which has been received by the victim aged about 4 and ½ years, the same has been proved and, therefore, sentence which has been awarded by the court below is just and proper in view of the given circumstances.

9. We have gone through the oral as well as documentary evidence which has been shown to us by the learned counsel for the respective parties along with reasoned judgment delivered by the Court below and also given thoughtful consideration to the arguments advanced by the learned counsel for the respective parties.

10. We have gone through the above referred evidences and minutely examined the same, where it has been found that mainly the Court below has placed reliance upon the evidence of complainant i.e., mother of the victim as well as medical evidence, more particularly, Dr.Bhikhabhai Maganbhai Patel P.W.1 Exh.7, along with the certificate issued by him at Exh.9, oral evidence of Dr.Jitendrakumar Chhaganlal Sutariya P.W.2 Exh.11 and the certificate issued by him Exh.13. Along with that, the Court below has also placed reliance upon FSL report Exh.34.

11. We have also minutely gone through the evidence of other witnesses and also given thoughtful

consideration to the arguments advanced by the learned counsel for the appellant. The complainant is an eye witness. She is the mother of the victim. The age of the victim is 4 ½ years and from the evidence of the complainant, it has been satisfactorily established that she is the witness of incident. She has seen the incident being done and accused has left thereafter, after wearing his clothes. Not only that, as they are neighbour, they know each other and, therefore, question of not identifying or mis-identification does not arise. It has also been deposed by her and same has not been denied and on that point, there is no cross-examination. Not only that, it has been categorically deposed that at the time of incident, the wife of the appellant and other family members were not at home. The same has also not been denied or there is no cross-examination on that line.

12. Not only that, victim herself has appeared before the Court and she has also tried to explain the incident. We are aware that no much importance can be given to the evidence of the victim looking to her age, but simultaneously complaint gets corroboration from her evidence. Not only that, even Jayantibhai has also supported the say of prosecution and prosecution got the support from the medical evidence which has categorically supported the say of the prosecution in toto. It is a scientific evidence wherein the Doctor has categorically deposed regarding the evidence and injury which has been

received by her and also deposed that when he has examined her, continuous bleeding was there. Not only that, in cross-examination also, he maintained his version that this injury is possible by way of rape and more particularly, if it has been done with force. F.S.L., report Exh.34 has also supported the say of the prosecution. From the above referred evidence, it has been established that the victim is having `O' blood group and same has been found from the bed-sheet which has been seized from the scene of offence along with other clothes. Not only that, appellant – accused is also having the blood group `B' and same has also been found.

13. In these circumstances, we are of the opinion that the evidence which has been led by the prosecution is sufficient to hold the guilt against the appellant – accused. As far as sentence is concerned, looking to the nature of offence and the way in which it has been done and also the age of victim is 4 ½ years and age of the appellant – accused is 52 years and the injury etc., the sentence which has been awarded by the Court below is just and proper and does not require any interference.

14. As far as other point which has been raised by the learned counsel for the appellant regarding the extra-ordinary confession of the appellant – accused is concerned, we are with the argument of the learned counsel for the appellant because when the appellant was produced before the Doctor for medical

examination, he was in police custody but if we leave aside the above evidence, then also there are ample evidence on record.

15. We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of **State of Karnataka V/s Hemareddy** reported in **AIR 1981 SC 1417** which reads as under :

> “.... This Court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry (1967) 1 SCR 93 : (AOR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice.”

16. Under the above circumstances, appeal is required to be dismissed and is accordingly dismissed. Notice is discharged.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

srilatha